

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FERRILL JOSEPH VOLPICELLI,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:10-cv-00005-LRH-VPC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' (#19) to dismiss, petitioner's motion (#34) for leave to file a traverse to the reply or in the alternative renewed motion for counsel, and respondents' motion (#36) to substitute party. Respondents seek the dismissal of a large number of claims in the petition primarily for lack of exhaustion.

Background

Petitioner Ferrill Joseph Volpicelli challenges his Nevada judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forgery, or counterfeiting of inventory pricing labels. Petitioner challenged his conviction on direct appeal and state post-conviction review.

Governing Exhaustion Law

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156

(9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee and must also state the facts that entitle the petitioner to relief on the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed petition presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

Discussion

Petitioner presents 23 grounds in the federal petition. Respondents challenge the exhaustion, in full or in part, of every ground except Grounds 7 and 11. Sundry groupings of grounds share common exhaustion issues. The parties have organized their argument by these groupings, and the Court similarly organizes its discussion by these same groupings. The Court thereafter discusses any remaining generalized across-the-board exhaustion arguments presented by petitioner.

Grounds 1, 2, 10, 12 through 17, and 19 through 22

The exhaustion issue with regard to Grounds 1, 2, 10, 12 through 17, and 19 through 22 essentially is whether these claims were fairly presented to the Supreme Court of Nevada on the state post-conviction appeal.

In federal Ground 1, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when appellate counsel failed to properly “federalize” direct appeal claims: (a) that the state district court erred in finding the indictment lawful after the State presented a prior burglary conviction to the grand jury; (b) that petitioner was not “competent” at the time of the crimes; (c) that the jury may have convicted petitioner on insufficient evidence; and (d) that the district court abused its discretion in finding habitual criminal status for two counts and running them consecutive.

1 In Ground 2, petitioner alleges that he was denied due process and equal protection in violation
2 of the Fifth, Sixth, and Fourteenth Amendments when the state supreme court failed to provide
3 necessary and adequate appellate review on direct appeal by allegedly not protecting petitioner's
4 constitutional rights when adjudicating the direct appeal claims presented.

5 In Ground 10, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
6 when trial counsel allegedly failed to protect him from a selective and vindictive prosecution.

7 In Ground 12, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
8 when trial counsel failed to object to the prosecutor's alleged vouching for the co-defendant's allegedly
9 known perjured testimony.

10 In Ground 13, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
11 when trial counsel failed to investigate and argue that storage unit representatives allegedly acted as
12 agents for the police in derogation of his Fourth Amendment right to privacy.

13 In Ground 14, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
14 when trial counsel allegedly did not investigate "discovery issues related to prosecutorial transgressions,
15 so as to unveil the state's purposeful withholding of exculpable [sic] evidence."

16 In Ground 15, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
17 when trial counsel failed to appeal the state district court's decision to not quash the indictment and
18 failed to investigate and proffer other alleged deficiencies in the indictment.

19 In Ground 16, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
20 because of an alleged "actual conflict of interest" between trial counsel and petitioner, although the
21 allegations presented do not reflect a true conflict of interest as opposed to a disagreement between
22 petitioner and trial counsel over "counsel's and Petitioner's tactics and theories on how to defend
23 Petitioner at trial."

24 In Ground 17, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
25 at sentencing when trial counsel allegedly failed to investigate and present "a host of mitigating
26 information."

27 In Ground 19, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
28 when counsel allegedly failed to protect him from an excessive sentence and unfair sentencing hearing.

1 In Ground 20, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
 2 when trial counsel failed to protect him from prosecution on two counts that allegedly impermissibly
 3 prosecuted him for his First Amendment freedom of thought in that he allegedly was prosecuted on the
 4 basis of law enforcement officer's perceptions of his private thoughts.

5 In Ground 21, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel
 6 when trial counsel failed to protect him from prosecution under allegedly unconstitutionally vague
 7 statutes in N.R.S. 205.060 and 205.965.

8 In Ground 22, petitioner alleges that he was denied rights to due process, equal protection,
 9 effective assistance of counsel, and a fair tribunal due to the cumulative effect of errors by counsel, the
 10 prosecution, and the court, including but not limited to, the allegations in the prior 21 grounds.

11 The factual allegations and argument presented – in federal court – in support of the foregoing
 12 grounds collectively span 44 pages in the federal petition.

13 No such specificity was presented in the briefing to the Supreme Court of Nevada on the state
 14 post-conviction appeal.

15 On state post-conviction review, the state district court dismissed all but four of petitioner's
 16 grounds in an interlocutory order and thereafter held an evidentiary hearing on the remaining four
 17 grounds.¹

18 On the state post-conviction appeal, the then-represented petitioner did not provide any
 19 argument specific to any of the grounds dismissed by the interlocutory order, with the limited exception
 20 of one conclusory reference to the habitual criminal adjudication.

21 Petitioner instead presented the following, in the main, conclusory argument:

22 **I. The Trial Court Erroneously Dismissed all but Four of**
 23 **Petitioner's Grounds for Relief without a Hearing**

24 An evidentiary hearing is required in regard to any claims that are
 25 supported by specific factual allegations unrepelled by the record and
 that would warrant relief if true. *Evans v. State*, 117 Nev. 609, 621, 28
 P.3d 498, 507 (2001).

26 This court recently held that the argument that counsel made
 27

28 ¹#23, Ex. 100.

reasonable strategic choices is in many instances a difficult assessment to make without the benefit of counsel's testimony at an evidentiary hearing. *Byford v. State*, 123 Nev. Adv. Op. No. 9 (2007) at p.3.

Certainly the attorney's decision to stipulate to the admission of the "prior convictions" was not a reasonable strategic choice, and the district court should have heard evidence on this issue.

#25, Ex. 137, at 3; see also *id.*, Ex. 143, at 1 (verbatim argument in reply brief, as amended).

The Supreme Court of Nevada stated as follows in this regard:

Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See *Mazzan v. Warden*, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

#25, Ex. 147, at 6-7.

In the *Mazzan* decision invoked by the Supreme Court of Nevada, the state high court held as follows:

Mazzan also lists six other claims which he raised in his petition and which the district court did not address: other instances of ineffective assistance of counsel; destruction of material evidence by the state; conflict-laden counsel; questioning by the state while Mazzan was held without a probable cause hearing; an unconstitutional instruction on reasonable doubt; and improper sentencing instructions. He does not cite the record regarding these claims, does not discuss their merits, and does not address whether they are procedurally barred. Contentions unsupported by specific argument or authority should be summarily rejected on appeal. See *Jones v. State*, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). *We therefore have not considered these claims.*

1116 Nev. at 75, 993 P.2d at 42 (emphasis added).

The state supreme court's citation to *Mazzan* thus reflects that the court summarily rejected the claims without considering the merits of the claims.

The grounds in question therefore were not fairly presented to the Supreme Court of Nevada and exhausted because they were not presented through a procedure in which the merits of the claims would be considered. It is established law that presenting a claim in a procedural context in which the merits

1 of the claim will not be considered, or will be considered only in special circumstances, does not
2 constitute fair presentation of the claim. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct.
3 1056, 1060, 103 L.Ed.2d 380 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Appellate
4 courts as a rule generally review only claims and issues argued specifically and distinctly in the briefing,
5 and a bare assertion of a claim or issue does not preserve the claim or issue for appellate review.
6 *See, e.g., Farmer v. McDaniel*, 666 F.3d 1228, 1233 n.5 (9th Cir. 2012); *Nevada Department of*
7 *Corrections v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011), *cert. denied*, 80 U.S.L.W. (Mar. 26, 2012).
8 In the present case, the state high court's citation to *Mazzan* confirms that the Supreme Court of Nevada
9 similarly did not review petitioner's wholly bare assertion of a multitude of claims in a blanket
10 conclusory fashion here.

11 In this regard, the presence of petitioner's *pro se* state post-conviction petition in the record
12 appendix on the state post-conviction appeal does not lead to a different conclusion. Under Nevada
13 state practice, petitioner could not incorporate claims from materials in the appendix into the appellate
14 briefing even if counsel had attempted to do so. Under Rule 28(e)(2) of the Nevada Rules of Appellate
15 Procedure (NRAP), parties may not incorporate briefs or memoranda filed in the state district court for
16 argument on the merits of an appeal. The provisions of NRAP 30(b)(2)(A) and (3) require the inclusion
17 of the district court pleadings in the appendix as a matter of course. The mere presence of a pleading
18 in an appendix on a Nevada appeal thus does not present any claim. Rather, the pleadings are present
19 in the appendix simply because that is what Nevada appellate rules require. Generally, in order to fairly
20 present a claim to a state appellate court, a petitioner must present the claim to the court within the four
21 corners of his appellate briefing. *E.g., Castillo v. McFadden*, 399 F.3d 993, 1000 & 1002 n.4 (9th Cir.
22 2005); *see also Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 1351, 158 L.Ed.2d 64 (2004) ("We
23 . . . hold that ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must
24 read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal
25 claim in order to find material, such as a lower court opinion in the case, that does so."). The state
26 supreme court's citation to *Mazzan* in this case confirms that, under established Nevada appellate
27 practice, petitioner did not fairly present any of the claims in question to the Supreme Court of Nevada
28 because he did not present specific supporting argument within his briefing.

Moreover, even if the Court were to assume, *arguendo*, that the state supreme court's disposition constituted a disposition on the merits of the claims in question, the claims nonetheless would not be fairly presented and exhausted under established law. If the petitioner fundamentally alters the legal claim presented to the state courts on federal habeas review, the claim in federal court is not exhausted. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 989-90 (9th Cir. 2002). Here, there can be no doubt that presenting multiple specific claims in federal court with allegations and argument spanning 44 pages fundamentally alters a bare reference to claims *in globo* with no specific argument as to any of the claims in the state supreme court. None of the specifics presented in the federal petition were presented to the state supreme court within the governing appellate briefing rules.

However the exhaustion issue is analyzed in this regard, it would stand the exhaustion doctrine on its head to hold that petitioner's bare assertion on appeal – without any specific argument as to any of the claims in question – exhausted the corresponding 44 pages of claims in the federal petition.

Grounds 1, 2, 10, 12 through 17, and 19 through 22 therefore are not exhausted.²

Grounds 3 through 6

The exhaustion issue with regard to Grounds 3 through 6 is whether the claims presented in state court were presented as federal constitutional claims rather than claims of state law error.

²As an alternative holding, the Court holds, in the event that a reviewing court concludes that the claims are exhausted, that the state supreme court's *arguendo* rejection of the conclusory presentation was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. In this regard, federal courts are restricted on federal habeas review to the state court record when deciding claims previously adjudicated on the merits by the state courts. *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). In the present case, the state supreme court was presented with only the barest of assertions as to these claims in the briefing on the state post-conviction appeal. Any *arguendo* rejection of the claims on the merits on that showing was neither contrary to nor an unreasonable application of clearly established federal law.

On the exhaustion issue, the Court further has assumed, *arguendo*, that the claims presented in federal court are the same as the claims presented in the state district court. The critical issue is whether the claims were fairly presented to the Supreme Court of Nevada on the post-conviction appeal.

The Court notes that it appears that state Grounds 12 and 14 were not dismissed in the interlocutory order. The critical point, however, again, is that the claims therein were not fairly presented on the state post-conviction appeal. The claims in federal Grounds 12 and 14 were not fairly presented to and/or considered on the state post-conviction appeal, regardless of whether or not they were dismissed by the interlocutory order. *See* #25, Exhs. 137 & 147. If Grounds 12 and 14 were not dismissed by the interlocutory order, then this weakens rather than strengthens the argument for exhaustion of these claims, because the conclusory argument presented on the state post-conviction appeal pertained to claims dismissed by the interlocutory order, not to other claims.

1 In federal Ground 3, petitioner alleges that he was denied due process of law in violation of the
2 Fifth and Fourteenth Amendments when a prior burglary conviction was presented to the grand jury.

3 In the claim presented on direct appeal, petitioner did not invoke any federal constitutional
4 provisions, and he cited no state or federal cases in the argument applying federal constitutional law to
5 overturn an indictment. Indeed, the Supreme Court of Nevada noted in its decision on direct appeal that
6 petitioner “cite[d] no law” whatsoever supporting his contention that the state district court erred by not
7 quashing the indictment. In the appellant’s opening brief, petitioner asserted only that the state district
8 court “may have erred” in not quashing the indictment, without invoking federal constitutional
9 protections and/or citing applicable state or federal cases applying same.³

10 In federal Ground 4, petitioner alleges that he was denied due process and equal protection of
11 the laws in violation of the Fifth, Sixth, and Fourteenth Amendments due to his alleged “mental
12 incompetency” at the time of the alleged crimes, perhaps referring to an alleged lack of capacity at the
13 time of the offenses. Petitioner alleges that he was not “competent” at the time of the burglaries and
14 related offenses because he suffered from, *inter alia*, asthma, sleep apnea, vertigo, depression, panic
15 anxiety disorder, and drug addiction.

16 In the claim presented on direct appeal, petitioner did not invoke any federal constitutional
17 provisions, and he cited no state or federal decisions whatsoever. Both the State and the Supreme Court
18 of Nevada – given the reference to competency rather than capacity – construed the claim presented on
19 direct appeal as a challenge to petitioner’s competency to stand trial. The state supreme court did not
20 apply constitutional doctrine in rejecting the claim as so construed. Any federal constitutional doctrine
21 *arguendo* applied necessarily would pertain to a claim challenging competency to stand trial, not a
22 challenge to capacity to commit the offenses.⁴

23 In Ground 5, petitioner alleges that he was denied due process and equal protection of the laws
24 in violation of the Fifth, Sixth and Fourteenth Amendments because insufficient evidence was presented
25 at trial due to a lack of corroboration of accomplice testimony required by N.R.S. 175.291.

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27 ³See #22, Ex. 59, at 8-9; *id.*, Ex. 68, at 1-3.

28 ⁴See #22, Ex. 59, at 9-10; *id.*, Ex. 68, at 3-5.

1 In the claim presented on direct appeal, petitioner discussed only the application of the
 2 requirement in N.R.S. 175.291 that accomplice testimony be independently corroborated. Petitioner
 3 did not invoke any federal constitutional provisions, and he cited no state or federal decisions
 4 whatsoever. The Supreme Court of Nevada analyzed the issue presented solely with respect to “the
 5 statutory standard of independent evidence connecting the defendant to the crime,” pursuant to N.R.S.
 6 175.291. The state supreme court did not directly or indirectly cite to or apply the federal due process
 7 standard for sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61
 8 L.Ed.2d 560 (1979).⁵

9 In Ground 6, petitioner alleges that he was denied due process and equal protection of the laws
 10 in violation of the Fifth, Sixth, and Fourteenth Amendments when the state district court sentenced him
 11 as a habitual criminal.

12 In the claim presented on direct appeal, petitioner contended that the state district court “abused
 13 its discretion” in sentencing him as a habitual criminal. Petitioner did cite to and discuss at a fair
 14 amount of length federal constitutional authority holding that state sentencing procedural requirements
 15 may give rise to a liberty interest protected by the due process clause.⁶ However, petitioner did not
 16 argue that constitutional error occurred in *his* case. He instead argued:

17 It appears clear that the district court make [sic] a finding of
 18 habitual criminal status based upon all the evidence presented. The three
 19 prior certifications of judgment of convictions appear to be
 20 constitutionally sound. The district court listened to all the parties,
 21 considered aggravating and mitigating evidence, *and incorporated*
 22 *language consistent with due process protection*. However, the district
 court abused its discretion when finding two counts satisfied the habitual
 criminal statute and ran those life sentences consecutively. When
 considering Appellant’s untreated mental health problems and the fact
 that the prior convictions were not violent, *the district court abused its*
discretion.

23 #22, Ex. 59, at 17-18 (emphasis added). The Supreme Court of Nevada, consistent with the argument
 24 presented, analyzed the claim exclusively under state law. See #22, Ex. 68, at 7-9.

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26
 27 ⁵See #22, Ex. 59, at 11-12; *id.*, Ex. 68, at 5-7.

28 ⁶#22, Ex. 59, at 16-17.

1 The federal constitutional claims presented in federal Grounds 3 through 6 were not fairly
 2 presented to the Supreme Court of Nevada and exhausted. Fair presentation requires that the petitioner
 3 present the state courts with both the operative facts and the federal legal theory upon which the claim
 4 is based. *E.g., Castillo*, 399 F.3d at 999. Here, none of the four grounds fairly presented the federal
 5 legal theories now pursued on federal habeas review.

6 With regard to federal Ground 5, which challenges the sufficiency of the corroboration of the
 7 accomplice testimony under N.R.S. 175.291, the Ninth Circuit has held that a state law requiring
 8 corroboration of accomplice testimony does not implicate constitutional concerns. *See, e.g., Laboa v.*
 9 *Calderon*, 224 F.3d 972, 979 (9th Cir. 2001). The mere assertion of the claim challenging the
 10 sufficiency of corroboration of accomplice testimony in satisfaction of the state statutory requirement
 11 therefore did not, in and of itself, present a federal due process challenge to the sufficiency of the
 12 evidence under *Jackson v. Virginia*.

13 With regard to federal Ground 6, which challenges the habitual criminal adjudication, no
 14 appellate court would have construed petitioner's state law argument on the claim as presenting a
 15 federal constitutional claim. While petitioner discussed due process protections, he expressly conceded
 16 that the sentencing court's findings were "consistent with due process protection," and he instead argued
 17 only that the court abused its discretion.⁷

18 Grounds 3 through 6 therefore are not exhausted.

20
 21 ⁷ The state court claim further did not even discuss equal protection, which is also is alleged as a legal theory in
 federal Ground 6.

22 Petitioner relies upon a sentence fragment by respondents stating: "although the opening brief cited to federal
 23 authority." A sentence fragment of course is not a complete sentence, and the rest of the sentence goes on to state, as
 24 also is observed in the text, that the brief conceded that the district court complied with due process. See #19, at 3, lines
 19-20. Respondents did not concede that Ground 6 – or any of the other grounds in question – were exhausted.

25 Petitioner further relies – with respect to the habitual criminal adjudication claim – upon a motion to recall the
 26 remittitur in pursuit of an untimely petition for rehearing. This motion filed after the conclusion of the *post-conviction*
 27 appeal does not lead to a different outcome on the exhaustion issue for at least two reasons. First, neither the motion nor
 the proposed petition for rehearing articulated any federal claims. Second, the state supreme court denied the motion
 and denied permission to submit a late petition for rehearing. See #25, Exhs. 149-150. Even if, *arguendo*, the untimely
 28 petition for rehearing had presented a federal claim, presenting a claim in a procedural context where the merits will not
 be considered or will be considered only in special circumstances does not fairly present a claim. *Castille, supra*.

1 **Ground 8**

2 In Ground 8, petitioner alleges that he was denied rights to effective assistance of counsel, due
3 process, equal protection of the laws, and a fair trial when trial counsel allowed him to be subjected to
4 an indictment that allegedly : (a) contained alleged multiplicitous and duplicitous charges, violating
5 his right to be free from double jeopardy; (b) was not supported by the trial evidence; and (c) lacked
6 specificity such that petitioner was left with no ability to defend the charges.

7 The Court is persuaded by respondents' contention that subparts (b) and (c) as described above
8 were not exhausted. The only claim presented to and/or considered by the Supreme Court of Nevada
9 on the state post-conviction appeal pertained to trial counsel's alleged failure to challenge charges as
10 multiplicitious and duplicitious and thus violative of double jeopardy protections.⁸

11 The Court further *sua sponte* holds that the independent substantive claims based on an alleged
12 denial of rights to due process, equal protection, and a fair trial were not exhausted. In the state post-
13 conviction appeal, petitioner presented a claim only of ineffective assistance of trial counsel to the
14 Supreme Court of Nevada in this regard. He did not present any independent substantive claims based
15 upon an alleged denial of rights to due process, equal protection and a fair trial.⁹

16 Ground 8 therefore is exhausted only to the extent that petitioner alleges that he was denied
17 effective assistance of counsel when trial counsel allowed him to be subjected to an indictment that
18 allegedly contained multiplicitous and duplicitous charges, violating his right to be free from double
19 jeopardy. Ground 8 is unexhausted to the extent that petitioner alleges that he was denied rights to due
20 process, equal protection of the laws, and a fair trial and also to the extent that petitioner alleges that
21 he was denied effective assistance of counsel when trial counsel allowed him to be subjected to an
22 indictment that allegedly was not supported by the trial evidence and lacked specificity.

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24 ⁸See #25, Ex. 137, at 7-8; *id.*, Ex. 147, at 4-5.

25 ⁹See #25, Ex. 137, at 7-8. Respondents contend that petitioner may not combine the independent substantive
26 claims with the claims of ineffective assistance of counsel within a single ground. See #19, at 6. That very well may be
27 true at the very least under Local Rule LSR 3-1 and the instructions for the petition form required thereby. However,
28 there would appear to be little utility in directing a *pro se* habeas petitioner to amend a 143-page petition to separate out
independent substantive claims into separate grounds where not only the vast majority of the claims in the petition are
unexhausted but, further, the independent substantive claims themselves are not exhausted.

1 **Ground 9**

2 In federal Ground 9, petitioner alleges that he was denied rights to effective assistance of
3 counsel, due process, equal protection and a fair trial when trial counsel failed to request jury
4 instructions for lesser included offenses. As noted previously, petitioner was charged and convicted
5 of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count
6 of unlawful possession, making, forgery, or counterfeiting of inventory pricing labels. Petitioner urges
7 that these charges “are lesser-included offenses of each other, in particular, the Burglary charges are
8 lesser-included offenses of each other and the conspiracy charge.” He maintains that he “could not have
9 committed the elements of the Conspiracy Offense without committing the elements of the Burglary
10 offenses.”¹⁰

11 Respondents note that petitioner referred to the state district court’s rejection of the ineffective
12 assistance claim in state Ground 9 in the argument on state Ground 8 on the state post-conviction
13 appeal. Respondents contend, however, that petitioner nonetheless did not provide any argument
14 specifically challenging the ruling and claiming that the offenses are lesser included offenses.

15 Respondents’ argument is not without force. Petitioner’s state court briefing does refer to the
16 state district court’s rejection of the ineffective assistance claim in state Ground 9 with little if anything
17 in the way of argument as to the issue of lesser included offenses.¹¹ However, giving petitioner a
18 substantial benefit of the doubt, the Court will read the state court briefing as challenging the rejection
19 of the ineffective assistance claims in both state Grounds 8 and 9 on the same basis, that the charges
20 were merged into one. The state court briefing on this point is far from a model of clarity. However,
21 giving petitioner the benefit of the doubt, the Court will hold that the ineffective assistance claim in
22 Ground 9 is exhausted.

23 The Court is persuaded by petitioner’s alternative argument that the ineffective assistance claim
24 in federal Ground 9 clearly is without merit. Under 28 U.S.C. § 2254(b)(2), an unexhausted claim may
25 be dismissed on the merits notwithstanding a lack of exhaustion. As construed by the Ninth Circuit,

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27 ¹⁰#7, at 49-50.

28 ¹¹See #25, Ex. 137, at 7-8.

1 a district court can dismiss an unexhausted claim on the merits under § 2254(b)(2) “only when it is
 2 perfectly clear that the applicant does not raise even a colorable federal claim.” *Cassett v. Stewart*, 406
 3 F.3d 614, 623-24 (9th Cir. 2005).

4 It is perfectly clear that the ineffective assistance claim in federal Ground 9 does not raise even
 5 a colorable federal claim. The state supreme court held that the crimes of burglary and of unlawful
 6 possession, making forging or counterfeiting of inventory pricing labels are distinct individual offenses
 7 with different elements.¹² This holding on Nevada state law by the state’s highest court is the end of
 8 the matter with regard to that subsidiary point, as the Supreme Court of Nevada is the final arbiter of
 9 Nevada state law. Petitioner’s contention that he could not have committed the conspiracy without
 10 committing the burglaries plainly is meritless on its face. It is axiomatic that commission of a
 11 conspiracy offense does not require full commission of the underlying offense that is the subject of the
 12 conspiracy. *See, e.g., Nunnery v. Eighth Judicial District Court*, 124 Nev. 477, 480, 186 P.3d 886, 888
 13 (2008)(under Nevada law, conspiracy is committed under N.R.S. 199.480 upon reaching the unlawful
 14 agreement, without the requirement even of an overt act).

15 The claim of ineffective assistance of counsel in Ground 9 therefore will be dismissed on the
 16 merits under § 2254(b)(2) as not raising even a colorable federal claim.

17 The Court further *sua sponte* holds that the independent substantive claims in federal Ground
 18 9 based on an alleged denial of rights to due process, equal protection, and a fair trial were not
 19 exhausted. In the state post-conviction appeal, petitioner presented a claim, at the very level best, only
 20 of ineffective assistance of trial counsel to the Supreme Court of Nevada in this regard. He did not
 21 present any independent substantive claims based upon an alleged denial of rights to due process, equal
 22 protection and a fair trial.¹³

23 // //

24 // //

26 ¹²#25, Ex. 147, at 4-5.

27 ¹³See also note 9, *supra*. As an alternative holding, the Court holds that the independent substantive claims in
 28 federal Ground 9 further do not raise even a colorable federal claim, for the reasons discussed in the text as to the claim
 of ineffective assistance of counsel.

1 **Ground 18**

2 In Ground 18, petitioner alleges that he was denied rights to effective assistance of counsel, due
 3 process, equal protection, and a fair trial when trial and appellate counsel allowed him to be sentenced
 4 as a habitual criminal. Petitioner maintains: (a) that the Nevada legislature did not intend for non-
 5 violent property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010; and (b) that
 6 a February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010.

7 On the state post-conviction appeal, petitioner pursued a claim only that trial and appellate
 8 counsel were ineffective because they failed to argue that the 2004 conviction was not a prior offense.¹⁴

9 With regard to Ground 18(a), petitioner thus did not exhaust a claim that trial and appellate
 10 counsel were ineffective for failing to argue that the Nevada legislature did not intend for non-violent
 11 property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010. No such claim was
 12 presented to the Supreme Court of Nevada in the state post-conviction appeal.

13 With regard to Ground 18(b), the Court is not persuaded by respondents' argument that Ground
 14 18(b) presents only an independent substantive ground rather than a claim of ineffective assistance of
 15 counsel. Fairly read, part (b) of Ground 18 specifies the substantive issue that trial and appellate
 16 counsel allegedly were ineffective for failing to raise. So read, the claim of ineffective assistance of trial
 17 and appellate counsel in Ground 18(b) is exhausted.

18 That said, any and all independent substantive grounds asserted in Ground 18 – including the
 19 claimed deprivation of rights to due process, equal protection, and a fair trial – are not exhausted. Only
 20 a claim of ineffective assistance of counsel was pursued on the state post-conviction appeal. Further,
 21 the challenge to the habitual criminal adjudication pursued on direct appeal maintained that the state
 22 district court abused its discretion in adjudicating petitioner a habitual criminal. The underlying
 23 substantive arguments in neither Ground 18(a) nor Ground 18(b) were presented to the state supreme
 24 court.¹⁵

25
 26 ¹⁴#25, Ex. 137, at 3-7; *id.*, Ex. 147, at 2-4.

27 ¹⁵See also note 9, *supra*. The Court is not necessarily persuaded by respondents' initial suggestion that
 28 petitioner violated Rule 2(c) of the Rules Governing Section 2254 Cases when petitioner divided Ground 18 into two
 (continued...)

Ground 18 therefore is exhausted only to the extent that petitioner alleges in Ground 18(b) that he was denied effective assistance of counsel because trial and appellate counsel did not argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010 for purposes of habitual criminal enhancement. Ground 18 is unexhausted to the extent that petitioner alleges: (a) that he was denied effective assistance of counsel because trial and appellate counsel did not argue that the Nevada legislature did not intend for non-violent property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010; and (b) that he was denied rights to due process equal protection, and a fair trial.

Ground 23

In Ground 23, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection, and a fair trial when trial counsel failed to protect him from the erroneous application of the habitual criminal statute. In support of this ground, petitioner alleges a variety of alleged errors in the habitual criminal adjudication, including alleged improper reliance on the February 11, 2004, conviction as a prior conviction, reliance upon a detective's testimony as to prior bad acts, reliance upon the detective's testimony as to hearsay statements by petitioner's ex-wife without his being able to confront or cross-examine her, reliance upon another detective's testimony as to hearsay statements by petitioner's accomplice, consideration of evidence not admitted at trial and facts not established beyond a reasonable doubt before the jury, and dissimilar treatment of petitioner in violation of equal protection.

///

¹⁵(...continued)

subparts. The Court is not sanguine that Rule 2(c) operates in such a hypertechnical matter. Moreover, respondents have argued in past cases that the pleading rules *require* that a petitioner subdivide claims of ineffective assistance of counsel.

As an alternative holding, the Court holds that all claims in Ground 18(a) do not raise even a colorable federal claim. The underlying moving premise that N.R.S. 207.010 does not contemplate imposition of habitual criminal sentencing based upon nonviolent crimes is fundamentally flawed. *See, e.g., Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("N.R.S. 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the court.") The frequent contention by *pro se* petitioners that the habitual criminal statute does not authorize habitual criminal sentencing when only nonviolent crimes are involved is one that holds sway in the jailhouse, not the courthouse.

1 Respondents contend that Ground 23 is at least partially unexhausted. The Court is persuaded
2 that the only exhausted claim in the ground is redundant of the claim in another partially exhausted
3 ground. The entire ground therefore either is unexhausted or redundant.

4 Petitioner raised claims pertaining to the habitual criminal adjudication on direct appeal and in
5 the state post-conviction appeal. As discussed, *supra*, regarding federal Ground 6, petitioner fairly
6 presented only a state law claim on direct appeal alleging that the state district court abused its
7 discretion in adjudicating petitioner a habitual criminal. He exhausted no independent substantive
8 federal law claims on direct appeal with regard to the habitual criminal adjudication. As further
9 discussed, *supra*, regarding federal Ground 18(b), on the state post-conviction appeal, petitioner fairly
10 presented only a claim that trial and appellate counsel were ineffective for failing to argue that the
11 February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010. None of the
12 remaining myriad specific claims of ineffective assistance of counsel and/or specific underlying
13 independent substantive error outlined in Ground 23 were fairly presented to the Supreme Court of
14 Nevada either on direct appeal or on the state post-conviction appeal. Federal Ground 23 thus is
15 exhausted only to the extent that petitioner alleges that trial counsel was ineffective for failing to object
16 to the use of the February 11, 2004, conviction as a prior conviction. However, the claim is wholly
17 redundant of the exhausted portion of Ground 18(b) to the limited extent that it is exhausted.

18 The Court will dismiss Ground 23 in part as redundant of Ground 18(b) to the extent that
19 Ground 23 alleges that trial counsel was ineffective for failing to object to the use of the February 11,
20 2004, conviction as a prior conviction. Ground 23 in all other respects is unexhausted.

21 ***Sua Sponte Consideration of Exhaustion of the Substantive Claims in Grounds 7 and 11***

22 In Ground 7, petitioner alleges that he was denied rights to effective assistance of counsel, due
23 process, equal protection, and a fair trial when trial counsel failed to protect him from an allegedly
24 excessive restitution order by the sentencing court.

25 In Ground 11, petitioner alleges, *inter alia*, that he was denied rights to effective assistance of
26 counsel, due process, equal protection, and a fair trial when trial counsel failed to protect him from the
27 admission of irrelevant, inconsistent, and/or perjured testimony at trial by petitioner's accomplice and
28 co-conspirator, Brett Bowman.

1 With regard to Ground 7, the only claim that was exhausted was a claim on the state post-
 2 conviction appeal alleging that petitioner was denied effective assistance of counsel when trial counsel
 3 failed to protect him from an allegedly excessive restitution order by the sentencing court. No
 4 independent substantive claims of trial court error – whether as violations of rights to due process, equal
 5 protection and a fair trial or otherwise – were fairly presented to the state supreme court in this regard.¹⁶

6 With regard to Ground 11, the only claim that was exhausted was a claim on the state post-
 7 conviction appeal alleging that petitioner was denied effective assistance of counsel when trial counsel
 8 failed to impeach accomplice Bowman’s allegedly inconsistent and/or perjured testimony with his prior
 9 inconsistent statements. No independent substantive claims of error were fairly presented to the state
 10 supreme court in this regard.¹⁷

11 With regard to the independent substantive claims, as noted previously, respondents contend that
 12 petitioner may not combine the independent substantive claims with the claims of ineffective assistance
 13 of counsel within a single ground. As discussed previously, that may well be true at the very least under
 14 the instructions for the Court’s required habeas petition form. However, as also noted previously, there
 15 would appear to be little utility in directing a *pro se* habeas petitioner to amend a 143-page petition to
 16 separate out independent substantive claims into separate grounds where not only the vast majority of
 17 the petition is unexhausted but, further, the independent substantive claims themselves are not
 18 exhausted. The Court accordingly takes up the lack of exhaustion *sua sponte* rather than taking up
 19 pleading technicalities in the first instance.¹⁸

20 Ground 7 therefore is exhausted only to the extent that petitioner alleges that he was denied
 21 effective assistance of counsel when trial counsel failed to protect him from an allegedly excessive
 22 restitution order by the sentencing court. All other claims therein are unexhausted.¹⁹

24 ¹⁶See #25, Ex. 137, at 9-10; *id.*, Ex. 147, at 5-6.

25 ¹⁷See #25, Ex. 137, at 10-11; *id.*, Ex. 143, at 9-12; *id.*, Ex. 147, at 6.

26 ¹⁸See note 9, *supra*.

27 ¹⁹It appears subject to substantial question whether the claim seeking a reduction in the restitution order is

(continued...)

Ground 11 therefore is exhausted only to the extent that petitioner alleges that he was denied effective assistance of counsel when trial counsel failed to impeach accomplice Brett Bowman's allegedly inconsistent and/or perjured testimony with his prior inconsistent statements. All other claims therein are unexhausted.

Petitioner's Generalized Exhaustion Arguments

The Court is not persuaded by petitioner's remaining generalized, across-the-board arguments seeking to establish that all or part of the foregoing claims nonetheless are exhausted and/or that the lack of exhaustion of the claims should be disregarded.

Petitioner's various arguments challenging respondents' ability to pursue the defenses raised herein by a motion to dismiss are without merit. Moreover, the scheduling order (#17) in this matter specifically provided for the assertion of defenses raised herein by way of a motion to dismiss. The presentation of defenses such as lack of exhaustion, failure to state a claim, and failure to raise a colorable claim via such a motion is entirely proper. Petitioner's arguments regarding the interaction between the Federal Rules of Civil Procedure and habeas practice in this context are without merit.

Petitioner's argument that the motion to dismiss is based upon sealed documents that have not been provided to him also is meritless. Respondents filed three documents under seal – the presentence report and two orders for payment of attorneys fees to state post-conviction counsel. While these documents possibly may have relevance to issues later in the case, a point which the Court does not address at this juncture, the issues raised by the motion to dismiss do not turn on these documents. The content of petitioner's presentence report and of the two orders have nothing to do, in particular, with the question of whether petitioner exhausted his claims in the state courts. That issue turns upon the content of his briefing in the state supreme court. Petitioner's arguments regarding the sealed exhibits, here and as discussed *infra* as to other issues, present nothing more than a red herring.

¹⁹(...continued)

cognizable in federal habeas corpus. See *Bailey v. Hill*, 599 F.3d 976 (9th Cir. 2010). Further, there is no clearly established federal law vis-à-vis the adequacy of representation at a noncapital sentencing proceeding. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir.2006)(quoting prior authority); *Davis v. Belleque*, 2012 WL 76897 (9th Cir., Jan. 11, 2012)(unpublished); *Vigil v. McDonald*, 2011 WL 5116915 (9th Cir., Oct. 28, 2011)(unpublished)(harmonizing circuit authority).

1 Petitioner further contends that respondents’ state court record exhibit No. 62, designated as a
 2 “Notice of Election Not to File a Reply Brief,” filed on the direct appeal, is incomplete. Petitioner urges
 3 that “this exhibit most certainly provide [sic] additional supporting legal memorandum[sic].”²⁰ This
 4 argument lacks any rationally conceivable merit. A notice by appellate counsel that she was not filing
 5 a reply brief – by definition – would not be accompanied by any briefing, much less briefing fairly
 6 presenting claims not included in the appellant’s opening brief on direct appeal.²¹

7 Petitioner’s reliance upon the presentation of claims in his state post-conviction petition as
 8 establishing exhaustion is misplaced. To exhaust a claim, petitioner must fairly present the claim in the
 9 state courts all the way through to the state’s highest court, here the Supreme Court of Nevada.
 10 *Peterson, supra; Vang, supra*. A claim that is asserted in the state district court but that is not
 11 specifically argued thereafter on the state post-conviction appeal is not exhausted.²²

12 Petitioner further maintains that he could not present claims *pro se* on the represented direct
 13 appeal and state post-conviction appeal. However, even on a direct appeal in the underlying criminal
 14 case, a represented defendant has no right to have *pro se* filings considered because a criminal defendant
 15 has no constitutional right to both self-representation and the assistance of counsel in the same
 16 proceeding. *See, e.g., United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir.1987); *United States v.*
 17 *Halbert*, 640 F.2d 1000, 1009 (9th Cir.1981). Moreover, a criminal defendant has no right of
 18 self-representation on direct appeal in the first instance. *Martinez v. Court of Appeal of California*, 528
 19 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). And, even on direct appeal, a defendant does not
 20 have a constitutional right to have appointed appellate counsel present every nonfrivolous issue
 21 requested by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

22
 23 ²⁰#31, at 8-9.

24 ²¹The Court further takes judicial notice of the content of the online docket record of the Supreme Court of
 25 Nevada for No. 43203. The copy in the record in this Court is in every respect identical to the copy available on the
 26 state supreme court’s online docket. Both have a cover page as page 1, a body of the notice as page 2, and a certificate
 27 of mailing as a page 4, with no page 3. See <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=11054>. It
 28 again is completely ludicrous to suggest that such a filing would include a missing phantom brief exhausting claims on
 direct appeal that were not included in the appellant’s opening brief.

²²The automatic inclusion of the state petition in the record exhibit appendix as required by state appellate rules
 did not fairly present any claim. See text, *supra*, at 6.

1 Appellate counsel instead is expected to exercise independent professional judgement in selecting the
2 issues to pursue on appeal. *Id.*

3 Petitioner has not identified any *pro se* submissions that he sought to present to the state
4 supreme court on either the represented direct appeal or state post-conviction appeal. However, even
5 if petitioner had made such submissions that were not accepted for filing, the submissions would not
6 have exhausted any claim. Again, presenting a claim in a procedural context in which the merits of the
7 claim will not be considered, or will be considered only in special circumstances, does not constitute
8 fair presentation of the claim. *See, e.g., Castille, supra.* Merely because a defendant or petitioner would
9 not have been able to present claims *pro se* on represented state court appeals does not give a federal
10 habeas petitioner *carte blanche* thereafter to raise claims that never were fairly presented to the state
11 supreme court. It would be a strange exhaustion rule indeed that would allow the state courts to be
12 automatically bypassed in this fashion for what then would be a *de novo* review in federal court of
13 claims that two attorneys did not deem worthy of specific argument on direct appeal or a state post-
14 conviction appeal. Any alleged deficiencies in the state appellate representation are more appropriately
15 addressed under procedural default doctrine, not by circumventing exhaustion rules in the first instance.

16 In this same vein, petitioner urges that any failure to exhaust on state post-conviction review was
17 due to counsel's alleged failure to comply with state procedural requirements. The issue at present,
18 however, is whether the claims were exhausted. They were not. The mere fact that counsel did not
19 pursue a claim in the state courts does not necessarily establish deficient representation as opposed to
20 an independent professional judgment as to the most potentially viable claims to argue on an appeal.
21 If petitioner believes that he can establish cause and prejudice for his failure to present the claims
22 previously to the state supreme court based on alleged failures by his appellate counsel, he must make
23 that argument in the first instance to the state courts, as discussed below.

24 In this regard, the Court is not persuaded by petitioner's argument on the showing made that the
25 claims should be deemed exhausted on the basis that they would be found to be procedurally barred by
26 the state courts. The standards for excusing a procedural default are substantially the same in Nevada
27 state court as they are in federal court. Accordingly, this Court does not hold claims to be exhausted
28 on this basis in the absence of an unequivocal stipulation by a petitioner that the unexhausted claims

1 in fact would be denied on state procedural grounds if he returned to state court to present the claims.
2 Such an unequivocal stipulation, to in truth be unequivocal in light of the application of the procedural
3 default rules under Nevada state post-conviction procedure, must include concessions: (1) that petitioner
4 cannot avoid dismissal of the claims in the state courts because he cannot demonstrate cause and
5 prejudice in the state courts to overcome the state procedural bars;²³ (2) that petitioner cannot avoid
6 dismissal of the claims in the state courts because he cannot demonstrate in the state courts that the
7 alleged constitutional violation probably has resulted in the conviction of one who is actually innocent
8 and cannot thereby overcome these procedural bars;²⁴ and (3) that the procedural bars otherwise are now
9 consistently applied by the Nevada state courts, such that it is not possible that the state courts, as a
10 discretionary matter, would consider the claims despite the procedural default and despite a failure to
11 demonstrate either cause and prejudice or actual innocence.

12 In the absence of such concessions, the Court will not hold that there is no possibility that the
13 unexhausted claims would be considered by the state courts on the merits. In the presence of such
14 concessions, the Court will dismiss the claims instead with prejudice on the basis of procedural default.
15 Given the substantial similarity of the Nevada and federal standards, there simply is no reason for not
16 according the state courts the first opportunity to address a petitioner's efforts to overcome a state
17 procedural bar.

18 The Court accordingly is not persuaded, on the showing made, that there is an absence of
19 corrective process in the state courts and/or that exhaustion would be futile on the premise that the
20 unexhausted claims necessarily would be deemed procedurally barred.

21 Nor is the Court persuaded that exhaustion otherwise would be futile because the state supreme
22 court allegedly has rejected similar claims previously. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 130, 102

23 *See, e.g., Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006) ("A petitioner can overcome the bar to an untimely or
24 successive petition by showing good cause and prejudice."); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th
25 Cir. 2004) (recognizing that Nevada's cause and prejudice analysis and the federal cause and prejudice analysis are
26 nearly identical).

27 ²⁴ *See, e.g., Mitchell*, 149 P.3d at 36 ("Even when a petitioner cannot show good cause sufficient to overcome
28 the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner can demonstrate that 'a
constitutional violation has probably resulted in the conviction of one who is actually innocent,' *citing Murray v.*
Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

1 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982)(“If a defendant perceives a constitutional claim and believes
2 it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they
3 will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional
4 argument may decide, upon reflection, that the contention is valid.”).

5 The Court accordingly rejects all of petitioner’s generalized arguments seeking to overcome the
6 lack of exhaustion of the foregoing claims. To exhaust his claims, petitioner must fairly present them
7 to the state courts through to the Supreme Court of Nevada, along with any arguments that he may have
8 to overcome any procedural defenses raised in those courts.

9 ***Remaining Issues on the Motion to Dismiss***

10 The Court’s exhaustion holdings eliminate any need to reach the remaining issues raised by
11 respondents in the motion to dismiss except as to one issue.

12 Respondents contend that Ground 18(b) is moot. In the exhausted portion of Ground 18(b),
13 petitioner alleges that he was denied effective assistance of counsel because trial and appellate counsel
14 failed to argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S.
15 207.010 for purposes of habitual criminal enhancement. Respondents urge that these claims are moot
16 because the Supreme Court of Nevada held on the state post-conviction appeal that the error in
17 considering the 2004 conviction was harmless because the State presented a sufficient number of other
18 prior convictions. The Court is not persuaded that the state supreme court’s holding renders Ground
19 18(b) moot. A state court’s holding that an error was harmless does not render a claim moot. Rather,
20 the issue remains for the merits of whether the state court’s rejection of the claims of ineffective
21 assistance of counsel was contrary to or an unreasonable application of clearly established federal law.

22 On another issue, petitioner requests in the alternative in his opposition that he be granted a stay
23 to return to state court to exhaust any unexhausted claims. To seek a stay, a party must file a separate
24 motion. Parties may not present such requests for other relief within a brief. This order provides
25 petitioner a time period within which to file a motion for dismissal of the entire petition, for dismissal
26 of only the unexhausted claims and/or for other appropriate relief. If petitioner wishes to move for a
27 stay, that is the juncture in the proceedings to request same.

28 ////

Petitioner should note in this regard that the requirements for a stay under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), operate independently of one another. That is, a petitioner must show, for example, good cause for the failure to exhaust the claims as a separate and independent requirement from the requirement that he must show that the unexhausted claims include at least one claim that is not plainly meritless. Petitioner contends in his opposition that “this Court should find good cause, as Ground 23 is not meritless, and Volpicelli has shown some extreme or unusual event beyond his control.”²⁵ The question of whether a claim is not plainly meritless is a separate and distinct question from whether the petitioner had good cause for the failure to exhaust the claim. Showing that a claim is not plainly meritless does not establish good cause.

Remaining Matters

Petitioner’s motion for leave to file a traverse, *i.e.*, a surreply, to respondents reply or in the alternative renewed motion for appointment of counsel will be denied.

As discussed *supra* at 18, the sealed exhibits – primarily petitioner’s presentence report – have nothing to do with the issues decided on the motion to dismiss. The filing of the sealed exhibits thus provides a basis neither for the filing of an additional memorandum or for the appointment of counsel.

As also discussed *supra* at 19, petitioner’s suggestion that Exhibit 62 – a notice of intent to *not* file a reply brief on direct appeal – is incomplete and might show exhaustion of otherwise unexhausted claims is simply ludicrous. The Court is not going to grant leave to file a surreply, appoint counsel, order expansion of the record, and/or order discovery to pursue petitioner’s utterly frivolous argument in this regard. The copy of Exhibit 62 in the record in this matter is identical to the copy on the online docket record of the state supreme court, and – in all events – any suggestion that the document would demonstrate exhaustion of claims, again, is wholly without merit.

Petitioner’s contention that respondents have presented new argument in their reply is without merit. All of the argument presented in the reply was in response to argument by petitioner.

The renewed request for appointment of counsel is denied, for the reasons previously assigned in #11. Petitioner is an experienced frequent litigator in this Court, and he has demonstrated an

²⁵#31, at 21.

adequate ability to articulate his claims, both in this and other matters. To the extent that petitioner expresses concern about the alleged complexity of the case – on a 143-page petition that he filed in proper person – it would appear that the case potentially is about to become markedly less complicated. Petitioner in any event has demonstrated the ability to articulate both a multitude of claims and voluminous argument in support of same. While almost any *pro se* litigant would be better served with the assistance of counsel, that is not the standard for appointment of counsel.

Respondents' motion to substitute a successor officer for the prior warden will be granted.

Respondents – in the briefing – seek clarification of the order (#29) granting their motion (#26) to file exhibits under seal and *in camera*.²⁶ Respondents filed a motion that the Court granted without qualification. To the extent that the motion sought, and obtained, an order directing the filing of the exhibits not only under seal but also *in camera*, respondents state a willingness to provide petitioner a copy of the sealed exhibits other than the presentence report at this time. Respondents further state a willingness to provide petitioner an opportunity to review the presentence report if it becomes at issue, pursuant to the procedure in NDOC AR 568. The Court has no objection to petitioner being copied with the other exhibits, and it has no objection to petitioner being allowed to review his presentence report in a manner consistent with required institutional procedures. The Court indeed has no objection to respondents doing both without waiting for the presentence report to become at issue, if it ever will, to, hopefully, eliminate any further discussion in this regard.

IT THEREFORE IS ORDERED that respondents' motion (#19) to dismiss is GRANTED IN PART, such that:

(1) Ground 9 is DISMISSED IN PART on the merits under § 2254(b)(2) as not raising even a colorable federal claim to the extent that petitioner claims ineffective assistance of counsel in Ground 9;

(2) Ground 23 is DISMISSED IN PART as redundant of Ground 18(b) to the extent that Ground 23 alleges that trial counsel was ineffective for failing to object to the use of the February 11, 2004, conviction as a prior conviction; and

²⁶#33, at 2-3.

1 (3) the Court holds that the following grounds and/or claims (hereafter, the
2 “unexhausted claims”) are not exhausted:

- 3 (a) Grounds 1 through 6, 10, 12 through 17, and 19 through 22;
- 4 (b) all claims in Ground 7 **other than** the claim that petitioner was
5 denied effective assistance of counsel when trial counsel failed
6 to protect him from an allegedly excessive restitution order by
7 the sentencing court;
- 8 (c) all claims in Ground 8 **other than** the claim that petitioner was
9 denied effective assistance of counsel when trial counsel allowed
10 him to be subjected to an indictment that allegedly contained
11 multiplicitous and duplicitous charges, violating his right to be
12 free from double jeopardy;
- 13 (d) any and all claims remaining in Ground 9 following upon the
14 Court’s dismissal of the claim of ineffective assistance of
15 counsel in Ground 9;
- 16 (e) all claims in Ground 11 **other than** the claim that petitioner was
17 denied effective assistance of counsel when trial counsel failed
18 to impeach accomplice Brett Bowman’s allegedly inconsistent
19 and/or perjured testimony with his prior inconsistent statements;
- 20 (f) all claims in Ground 18 **other than** the claim in Ground 18(b)
21 that petitioner was denied effective assistance of counsel when
22 trial and appellate counsel did not argue that the February 11,
23 2004, conviction did not constitute a prior offense under N.R.S.
24 207.010 for purposes of habitual criminal enhancement; and
- 25 (g) any and all claims remaining in Ground 23 following upon the
26 Court’s dismissal of Ground 23 in part as redundant of a claim
27 in Ground 18(b).

28 ////

1 IT FURTHER IS ORDERED that petitioner shall have **thirty (30) days** from entry of this order
2 within which to mail to the Clerk for filing a motion for dismissal without prejudice of the entire
3 petition, for partial dismissal only of the unexhausted claims, and/or for other appropriate relief. The
4 entire petition will be dismissed without prejudice for lack of complete exhaustion if a motion is not
5 timely filed. Further, if petitioner seeks dismissal only of the unexhausted claims, he shall specify the
6 claims as to which dismissal is sought, using the same language as is used in subparagraphs 3(a)
7 through (g) in the above paragraph. Any failure to unambiguously so identify the specific claims to be
8 dismissed on a motion for partial dismissal may result instead in the entire petition being dismissed, for
9 lack of a clear election of requested remedies by petitioner.

10 IT FURTHER IS ORDERED that the standard opposition (14 days from service of the motion)
11 and reply (7 days from service of the opposition) times under Local Rule LR 7-2 shall apply to any
12 motion filed.

13 IT FURTHER IS ORDERED that petitioner's motion (#34) for leave to file a traverse to the
14 reply or in the alternative renewed motion for counsel is DENIED.

15 IT FURTHER IS ORDERED that respondents' motion (#36) to substitute party is GRANTED,
16 and Robert LeGrand shall be substituted for Jack Palmer as a respondent.

17 IT FURTHER IS ORDERED that, notwithstanding any prior order, respondents may provide
18 petitioner copies of Sealed Exhibits 2 and 3 in #27 and, in their discretion, may enable petitioner to
19 review Sealed Exhibit 1 in #27 in a manner consistent with the applicable administrative regulations and
20 institutional procedures.

21 DATED this 16th day of May, 2012.



22
23
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
26
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28